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EVERYTHING YOU EVER
NEEDED TO KNOW ABOUT
LAKES, STREAMS, RIVERS,
RIPARIAN RIGHTS,
ACCRETIONS & AVULSIONS

Robert Honea

**EVERYTHING YOU EVER NEEDED TO KNOW
ABOUT LAKES, STREAMS, RIVERS, RIPARIAN RIGHTS,
ACCRETIONS & AVULSIONS**

Introduction

"See how this river comes me cranking in, And cuts me from the best of all my land . . . " *William Shakespeare No. 1 Henry IV, Act 3, Scene 1, Lines 97-98.*

"If it's on the river, it's all screwed up."

J. H. Evans, free advice to Bob Honea.

"Honea, that has to be the most boring topic in the history of the Institute."

One of my partners, upon receiving the flyer for this Institute.

When I let Chuck Morgan talk me into speaking on this topic, I acquiesced on the misguided assumption that this subject was a simple one, on which I could prepare a paper in a brief afternoon, take credit for extra hours for being a speaker, and make it to the track in plenty of time for the first race. I have since found that the quotes set forth above accurately summarize this subject. It is indeed mind-numbingly boring, and to make matters worse arises infrequently. At the same time, when a riparian rights problem is encountered, it is invariably a Pandora's box of problems – those who embark to resolve such an issue seem to consistently complain of finding themselves up to their elbows in alligators, when all they really wanted to do was drain the swamp. It is certainly the position I have found myself in, both in the course of advising clients and in the course of preparing this paper.

That having been said, I believe that the problems created by riparian rights law all have their roots in the fact that this body of law has the practical effect of creating a moving target. The very boundaries of a person's land, and the boundaries between states and counties, can be altered substantially, by circumstances beyond anyone's control. Worse yet, there is nothing in the public records which can be relied on to establish if, when, where, how, and to what extent boundaries may have changed. It is, instead, an area of the law in which it is truly every man for himself, and often no one knows who owns what until an appellate court issues a final ruling.

I have attempted in this paper to summarize in as concise a format as possible the applicable legal principles. Unfortunately, as those of you who have encountered a riparian rights issue have learned, knowing the applicable rules of law doesn't solve your problem, it only tells you what your problem is.

Nevertheless, I hope that the discussion that follows will prove useful.

I. Historical Background

The roots of modern American law on riparian rights are found in the common law of England as it existed in the early eighteenth century. English law at that time divided waters into two categories, navigable and non-navigable. The bed of navigable waters belonged to the king, while the bed of non-navigable waters belonged to the owners of the dry land on either side. The reason for the distinction between navigable and non-navigable waters was the belief that the right and ability to control navigation, fishing, and other commercial activity was an essential attribute of the king's sovereignty. The theory was that the king held such lands (and waters) in trust for all the people, for the common good.

The dividing line between navigable and non-navigable waterways under English common law was the point at which one could no longer observe the effect of tides on the level of the water. If the ebb and flow of the tide could be confirmed, the water (and the land under it) belonged to the king; if not, the land and water belonged to the adjoining landowners. St. Louis, Iron Mountain & Southern Railway Co. v. Ramsey, 53 Ark. 314 (1890).

As to navigable waterways, the boundary line between the king's land and the riparian owner was the high water mark. As to non-navigable waterways, the adjoining owners each took "*usque ad medium filum aquae*" (literally, "to the middle"). Finally, English common law recognized the doctrine of accretion, i.e., the premise that as the action of the wind, waves, and current washed land from one shore and deposited it on another, the boundary line between the respective owners shifted also, whether the water be navigable or not. Ramsey, supra; Shively, infra.

When the thirteen original colonies declared their independence from Great Britain, they claimed title to the beds of all navigable waterways within their borders, on the ground that they were the sovereign successor to the English crown. See Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894). As subsequent states were admitted to the Union, the "equal footing" doctrine required that such states be admitted to the Union on the same basis as the original thirteen colonies, to include the right to sovereign ownership of the beds of all navigable waterways. Pollard's Lessee v. Hagan, 3 How. 212, 11 L. Ed. 565 (1845).

As the states acquired title to navigable waterways, most also adopted, by statute or constitutional provision, the entire body of English common law, en masse, to include

the previously described rules concerning the definition of navigability, the point at which boundary lines were to be drawn, and the concept of accretion. See Ark. Code Ann. § 1-2-119 (Repl. 1996).

This brief history lesson can be distilled to a few general principles that form the basis of modern American law on riparian rights: First, the states own the bed of navigable waters, to the high water mark; second, as to non-navigable waters, the adjoining (riparian) owners take to the “middle”; third, as the banks of rivers and lakes shift, so do the boundaries; and, fourth, any controversies concerning riparian rights are governed by state law. For a good summary of the history of this subject, I refer you to Utah Division of State Lands v. United States, et al., 482 U.S. 193, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987), and Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, 429 U.S. 363, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977).

II. Navigability

A. The General Rule

The obvious starting point for any discussion of riparian rights is the question of whether or not a particular body of water is “navigable.” The early American decisions followed the English common law, that any water in which the tide ebbed and flowed was navigable. The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825). It soon became apparent, however, that this rule would not work in America. In England, the commercial usefulness of a body of water was by and large equivalent to whether it was close enough to the ocean to be affected by tides. In America, there were numerous rivers and lakes which were clearly commercially useful, but which were far removed from the effect of the ebb and flow of tides.

In 1851, the United States Supreme Court abandoned the English definition of navigability in favor of one more suited to conditions in the United States. The Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). The general import of the Genessee Chief case and later decisions was to the effect that waters are navigable in law when they are navigable in fact, and that rivers are navigable in fact “when they are used or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). A few years later, the United States Supreme Court defined navigability in these terms:

“It is not, however, . . . every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.”

The Montello, 87 U.S. (20 Wall.) 430, 442 (1874).

The State of Arkansas has adopted a similar definition of navigability. See, e. g., Parker, Commissioner of Revenue v. Moore, 222 Ark. 811, 262 S.W. 2d 891 (1953), where the Arkansas Supreme Court held:

“But our own decisions and decisions of the U.S. Supreme Court have given the term [navigability] a practical meaning – a construction in keeping with realistic concepts of transportation.” (Citations omitted) Judge William C. Hook of the Eighth Circuit, in dealing with an Arkansas appeal, said that it was necessary – in order to meet the test of navigability as understood in American law – that a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should, he said, be of practical usefulness to the public as a highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, “or one that is temporary, precarious, and unprofitable, is not sufficient.”

We agree with Judge Hook's assertion that "to be navigable a watercourse must have a useful capacity as a public highway of transportation."

Other Arkansas cases utilizing this or an equivalent definition of navigability include McGahvey v. McCollum, Administrator, 207 Ark. 180, 179 S.W. 2d 661 (1944), and St. Louis, Iron Mountain & Southern Railway Company v. Ramsey, 53 Ark. 314 (1890). For a good summary of the law of navigability in the State of Arkansas prior to State v. McIlroy, *infra*, see The Vitality of the Navigability Criterion in the Era of Environmentalism, 25 Ark. Law Review 250 (1971).

B. State v. McIlroy

The foregoing definition of navigability was consistently applied in the State of Arkansas for well over a hundred years, until the decision of the Arkansas Supreme Court in State v. McIlroy, 268 Ark. 227, 595 S.W. 2d 659 (1980), a case concerning the navigability of the Mulberry River. McIlroy arose from a dispute between recreational users of the Mulberry River, primarily canoers, and the owners of the lands adjoining the river. Under Arkansas law, if a body of water is non-navigable, the riparian owner not only owns the bed of the stream, but has the right to exclude others from using the water overlying his land. Medlock v. Galbreath, 208 Ark. 681, 187 S.W. 2d 545 (1945). The owners of lands adjoining the Mulberry, relying on this principle, initiated litigation seeking injunctive relief prohibiting the recreational use of the Mulberry. The State of Arkansas intervened, claiming that the Mulberry was navigable and that the bed of the stream therefore belonged to the State, for the use and benefit of the public.

In a lengthy opinion, the Arkansas Supreme Court acknowledged the historical definition of navigability set forth above, and went so far as to state that "therefore, a

river is legally navigable, if actually navigable and actually navigable if commercially valuable.” Id. at 235. After recognizing that this was the proper definition of navigability, however, the Arkansas Supreme Court went on to hold that the Mulberry River was in fact navigable, notwithstanding the fact that the proof, by any reasonable reading, only established recreational uses. The decision drew a vigorous and lengthy dissent. One point made by the dissent, and completely ignored by the majority, was the fact that the McIlroy decision worked a substantial change in vested property rights. Applying the McIlroy definition of navigability, any stream that could float a canoe, even part of the year, would arguably be navigable, thus vesting title to the minerals underlying the bed of the stream in the State of Arkansas.

The mischief caused by the McIlroy decision as it relates to title to the oil, gas, and minerals underlying the Mulberry River was quickly resolved by statute. In 1981, the Arkansas legislature quitclaimed the bed of the Mulberry River to the adjacent riparian owners, reserving an easement for the use of the public in the water itself. Ark. Code Ann. § 22-5-406. The statute includes a procedure by which affected riparian owners can obtain a quitclaim deed from the Arkansas Land Commissioner. Interestingly, the statutory quitclaim conveyed all of the Mulberry River, even though the lower stretches of it were probably properly characterized as navigable by the old definition. Indeed, I am curious as to whether there are producing units which include the lower part of the Mulberry River, on which royalties are being paid to the State of Arkansas even though the State no longer owns such lands.

There have been no decisions since McIlroy in which any effort was made to apply the “new” definition of navigability to other streams or waterways. My prediction

is that if and when this issue should arise again, the McIlroy decision will be discredited, and the Arkansas Supreme Court will instead adopt a “public easement” theory which allows a ruling in favor of the recreational users, but leaves title, and specifically title to oil, gas, and minerals, as it was. In any event, if the Arkansas Supreme Court followed McIlroy literally, I would guess that the Arkansas legislature would in turn follow its precedent of quitclaiming the oil, gas, and minerals to the adjoining landowners, just as it did in the case of the Mulberry River. Nevertheless, McIlroy is the latest pronouncement of the Arkansas Supreme Court on the definition of navigability, and on its face it says that if you can float a canoe on a body of water, even part of the year, it is navigable and the State owns it.

C. The Position of the Corps of Engineers and the Land Commissioner

If you call the Arkansas Land Commissioner’s office and ask the Land Commissioner to tell you what lands the State of Arkansas claims are navigable, you will be told that the Land Commissioner believes that anything the Corps of Engineers considers navigable is owned by the State of Arkansas. I am attaching as Exhibit A to this paper a copy of the printout listing the streams located in the Little Rock District of the Corps of Engineers which are considered navigable by the Corps. I suggest that you will find it interesting reading. For example, the White River is considered navigable all the way to the Highway 45 bridge in Goshen, Arkansas. For those of you unfamiliar with the State of Arkansas, Goshen is located a few miles east of Fayetteville, in the northwest corner of the State, upstream of Beaver Lake. Believe it or not, those of you who have enjoyed trout fishing on the White River have actually been floating on a navigable waterway, at least according to the Corps of Engineers.

My guess is that there are quite a few producing units which include lands listed on Exhibit A, and which have not been leased from the State of Arkansas, on the assumption that the body of water was not navigable and that the adjoining landowners therefore held title. In fact, I know of at least one instance in which this exact situation recently occurred – a third party purchased a lease from the State of Arkansas for lands in a producing unit, and the third party then notified the operator that it intended to fully participate the interest. I do not know whether this dispute has been resolved, and if so, what the outcome was.

D. Can “Navigability” End, And If So, What Happens?

The Arkansas Supreme Court has very clearly held that “once navigable, always navigable” is not the rule in the State of Arkansas. Parker, Commissioner of Revenue v. Moore, supra. The Arkansas Supreme Court has further held that “once the navigability of a stream ceases, the rights of the riparian owner attach.” Gill v. Porter, 248 Ark. 140, 450 S.W. 2d 306 (1970). “. . . [T]he State’s title rests on navigability and . . . once the navigability of a stream ceases, the rights of the riparian owner attach . . .” Gill v. Porter, 248 Ark. 142, 450 S.W. 2d 306 (1970). See also Porter v. Arkansas Western Gas, 252 Ark. 958, 482 S.W. 2d 598 (1972), in which the Arkansas Supreme Court affirmed and adopted the following opinion of the chancellor:

“At the moment of, or upon the closing of the old river channel and the opening of the new cut-off, the old river channel ceased to be navigable, as was intended; and thus the State lost its claim or title thereto; and title to the old river bed vested in the then riparian owners.”

This rule applies whether the cause of the cessation of navigability is natural or man-made. Porter, supra; United States v. Keenan, 753 F.2d 681 (8th Cir. 1985).

There is also a statute in Arkansas which codifies this rule, at least as to dry lands above the ordinary high water mark. It reads, in pertinent part:

(a) "The title to all lands which have formed or may form in the beds of non-navigable lakes, or in abandoned river channels or beds, whether or not still navigable, which reformed lands or alluvia are above the ordinary high water mark, shall vest in the riparian owners to the lands and shall be assessed and taxed as other lands."

(b) "The lands referred to in subsection (a) of this section shall include those lands which have emerged or which may emerge by accretion, reliction, evaporation, drainage, or otherwise from the beds of lakes or from former navigable streams, whether by natural or artificial causes, or whether or not the lakes were originally formed from the channel or course of navigable or nonnavigable streams."

Ark. Code Ann. § 22-5-404 (Repl. 1996). (There is also a companion statute which sets forth a procedure for obtaining a deed from the State of Arkansas for such lands, Ark. Code Ann. § 22-5-405 (Repl. 1996)).

It would seem from the foregoing that this issue is relatively straightforward. If the body of water is no longer navigable, the State's title ends, and ownership vests immediately, at the moment navigability ceases, in the riparian landowners.

If you make the mistake of asking the Land Commissioner to state Arkansas' position on this topic, however, you don't necessarily get a straight answer. I am attaching as Exhibit B to this paper a letter from the Land Commissioner, attaching an opinion letter from the Attorney General's office. The Land Commissioner's position statement and the AG's opinion concern a bend in the river that was cut off when the Corps of Engineers dredged a new channel. The work performed by the Corps of Engineers would appear to have very clearly terminated the navigability of this body of water – at either end, the Corps of Engineers constructed dikes and revetments, of such a size and shape that the old river channel was entirely cut off from the new river channel

by dry land. It would seem logical to conclude that navigability ended when the dikes and revetments were constructed, landlocking the old river channel. Not so. According to the attached AG's opinion letter and the Land Commissioner's position statement, as long as there is still standing water, the State claims title, unless and until the final decision of a court of competent jurisdiction concludes that navigability has ceased.

E. Artificially Created Navigable Waters

By statute, Arkansas has disclaimed any interest in mineral rights underlying navigable waters which have been artificially created. Ark. Code Ann. § 22-5-815 (Repl. 1996). This statute includes a procedure whereby the owner of such lands can obtain a deed from the State of Arkansas.

F. Conclusion

I told you in the first part of this paper that the State owns the bed of navigable waters, and that the riparian owners hold title to the bed of non-navigable waters. I have now given you the historical definition of navigability, as it exists in Arkansas today, a statement of what the Corps of Engineers considers navigable, and a statement of the position of the Land Commissioner of the State of Arkansas as to what it is, exactly, the State claims title to. I challenge you to sort through all of this and come up with a clear-cut criteria for determining where navigability starts and stops. For my part, I again quote J. H. Evans: "If it's on the river, it's all screwed up."

IV. Accretion and Avulsion

A. Definitions and Distinctions

The concepts of accretion and avulsion are easily stated, but difficult of application. The Arkansas Supreme Court defined accretion in the early case of St. Louis, Iron Mountain & Southern Railway Company v. Ramsey, 53 Ark. 314 (1890) in these terms:

“Accretion is the increase of real estate, by the addition of portions of soil by gradual deposition, through the operation of natural causes, to that already in the possession of the owner.” Id. at 323.

Six years later, in the case of Wallace v. Driver, 61 Ark. 429 (1896), the Arkansas Supreme Court elaborated on the definition of accretion, describing it in these terms:

“In order to constitute an accretion, it is not necessary that the formation be indiscernible by comparison at two distinct points of time. It is true that it is an addition to riparian land, “gradually and imperceptibly made by the water to which the land is contiguous;” but the true test “as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on..””

In both Ramsey and Wallace, the Court recognized that where the water’s edge has shifted by the process of accretion, the boundary lines have shifted with the water.

“Hence, land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made.” Wallace, supra, at 431.

The concept and definition of accretion, and the effect of accretion on boundary lines, is to be distinguished from avulsion. In a broad sense, avulsion is the exact opposite of accretion. Stated differently, where the change in the location of a body of water is sudden and perceptible, the change is described as an avulsion, rather than an

accretion. Also, and again in contradistinction to the rules that apply to accretion, boundary lines do not change with a shift in the location of the body of water resulting from an avulsion. Instead, they remain and become fixed at their former location.

“The reverse of what has been said of accretions and erosions is true of avulsions. Where a stream which forms a boundary line of lands from any cause suddenly abandons its old, and seeks a new, bed, or suddenly and perceptibly washes away its banks, such change of channel or banks (if its limits can be determined) works no change of boundary. The owner still holds his title to the submerged land.” Wallace, supra, at 436.

In a case involving a dispute between Arkansas and Tennessee over the boundary line between the states, Arkansas v. Tennessee, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638 (1918), the United States Supreme Court described the two concepts, and the effect of the distinction between them, in the following terms:

“When the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.”

Other Arkansas cases discussing accretion and avulsion include Horne v. Howe Lumber Company, 209 Ark. 202, 190 S.W. 2d 7 (1947), Crow v. Johnston, 209 Ark. 1053, 194 S.W. 2d 193 (1946), and Yuttermann v. Grier, 112 Ark. 366, 166 S.W. 749 (1914). For a good summary of the Arkansas cases on accretion and avulsion prior to 1951, see Real Property – Riparian Rights – Accretion, Reliction, and Avulsion, 6 Ark. Law Rev. 68 (1951). One footnote is appropriate here – although it seems obvious, it bears emphasis that the rules of accretion and avulsion apply equally to navigable and non-navigable waters.

From the foregoing discussion, two conclusions can be drawn. First, if the location of a body of water has changed, it has been due to either accretion or avulsion. There is no gray area in between; the movement was due to one or the other. Second, if the movement of the body of water was due to accretion, the boundaries of the adjoining landowners shifted with it, but if the movement was due to avulsion, the boundary lines not only stayed where they were, they became fixed and permanent.

Having set forth the general rules, I am afraid I can provide you with little guidance as to how these rules should be applied in the real world. For example, if there has ever been any movement of a body of water due to an avulsion, the boundary lines between the riparian owners became fixed, never to change again regardless of any subsequent accretion, erosion, or avulsion. Needless to say, if one were inclined to argue the point, it would seem easy to find evidence somewhere, at some point in time, that the body of water in question was at a location you wanted it to be, then put together some kind of proof that its subsequent movement was due to an avulsion. A good example is McGee v. Matthews, 241 F. Supp. 300 (E. D. Ark. 1965), in which the party claiming an avulsion presented expert testimony that the type and age of trees on the land in question proved that the river's movement was due to an avulsion, and not an accretion. Another example is Mississippi v. Arkansas, 415 U.S. 289, 94 S. Ct. 1046 (1973), in which the party claiming an avulsion had a geologist take soil borings, then testify that the soil layers were inconsistent with the concept of accretion.

There are numerous other Arkansas cases in which the distinction between accretion and avulsion has been litigated. For my part, the only common thread I can see in the cases is that the party who has the burden of proof seems to lose the vast majority

of the cases. There is a stated presumption in favor of accretions. Pannell v. Earls, 252 Ark. 385, S.W. 2d 440 (1972). Nevertheless, I cannot distill from the cases any one fact or set of facts which appears to be dispositive of whether the movement was accretion or avulsion. Again, this is an area of the law in which each case turns on its facts, and no one can know for sure what the final resolution will be until the appellate court issues its mandate.

B. Acts of Man – Accretion or Avulsion?

In cases where the change in the location of a body of water is due to the acts of man, and specifically the acts of the Corps of Engineers, every Arkansas decision I have read holds that such changes are due to an avulsion, and not an accretion. See, e.g., Porter v. Arkansas Western Gas Company, *supra*. Indeed, I could find no Arkansas case in which the argument was even raised that changes due to the acts of man constitute an accretion, rather than an avulsion. I must also point out, however, that the United States Supreme Court has reached the opposite result, at least where the acts of man do not change the location of the channel, but only narrow it. In Bonelli Cattle Company v. Arizona, 414 U.S. 313, 94 S. Ct. 517 (1973), the actions of the Corps of Engineers in channeling the Colorado River had the effect of narrowing its bed, thereby creating dry land. The location of the channel itself, however, was not changed. The Supreme Court held that the newly formed dry land was an accretion rather than an avulsion.

The conclusion I draw from Bonelli is that if the acts of man do not change the location of the channel, but rather only confine and restrict it to a narrower area, there is at least an argument to be made that any resulting dry land is due to an accretion, rather

than an avulsion. This precise argument has never been addressed under Arkansas law, and it therefore remains an open question in this state.

C. The “Accretion Exception” Rule

Although the Arkansas Supreme Court has never addressed this issue, other courts have recognized the “accretion exception” rule. The typical fact pattern in which this exception arises is a situation where a river has looped back on itself, creating a peninsula with only a narrow strip of land at the base of the peninsula dividing the flow of the river. When the river gradually and slowly cuts a new channel across the narrow neck of land, ultimately creating a new channel and leaving an ox-bow, some courts have concluded that the rules of avulsion should apply, notwithstanding the fact that the change in the location of the channel was due to the gradual and imperceptible process of accretion and erosion. The United States Supreme Court, in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel, 429 U.S. 363, 97 S. Ct. 582 (1977), stated the rule in these terms:

“[The accretion rule] is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.” Id. at 368, 585.

As I have already indicated, this precise issue has never been directly considered or addressed by the Arkansas Supreme Court. There is a federal district court case applying Arkansas law, however, in which this exact fact pattern was presented. The court there never discussed the “accretion exception” rule, but instead addressed the issues as a straightforward accretion vs. avulsion case. The court there ruled that the creation of the cutoff was the result of accretion, thus vesting title to the ox-bow lake and the cut-off peninsula in the riparian owner on the opposite bank. McGee v. Matthews, *supra*. Similarly, in a case involving an island on a non-navigable waterway, the same result was reached on a standard accretion/evulsion analysis. Goforth v. Wilson, 208 Ark. 33, 184 S.W. 2d 665 (1967). Again, this “exception” was not argued or mentioned.

I do not understand why this argument has never been presented to the Arkansas Supreme Court, as it seems a logical one. In any event, if you encounter this fact pattern, you should be aware of this exception.

D. Ark. Code Ann. § 22-5-404 (Repl. 1996)

In 1945, the Arkansas legislature passed Act No. 203. The legislation was very clearly intended to provide riparian landowners with a means of acquiring a deed from the State of Arkansas for lands which had formed in the beds of formerly navigable lakes and streams. The way the statute is phrased, however, I believe it could be construed as adopting the “accretion exception” rule. In any event, because the statute provides a means for obtaining a deed from the State of Arkansas, it is a statute that merits particular consideration. The statute reads as follows:

“(a) The title to all lands which have formed or may form in the beds of non-navigable lakes, or in abandoned river channels or beds, whether or not still navigable, which reformed lands or alluvia are above the ordinary

high water mark, shall vest in the riparian owners to the lands and shall be assessed and taxed as other lands.

(b) The lands referred to in subsection (a) of this section shall include those lands which have emerged or which may emerge by accretion, reliction, evaporation, drainage, or otherwise from the beds of lakes or from former navigable streams, whether by natural or artificial causes, or whether or not the lakes were originally formed from the channel or course of navigable or non-navigable streams.” Ark. Code Ann. § 22-5-404 (Repl. 1996).”

This legislation was originally adopted in 1945. In 1953, the language of this statute was amended. The preamble to the 1953 Act read:

“Whereas, many cutoffs have been made in the Mississippi River, and other rivers in the State of Arkansas, both naturally and artificially for the purpose of controlling the current of the river and the bank stabilization, and many old former river beds have remained as the result of such cutoffs and have gradually built up and reached the high water mark as defined by the Supreme Court of Arkansas, . . . , and permanent timber vegetation has grown on all or parts of said old abandoned river beds; and,

Whereas, it is intended hereby to clarify the intent of [Ark. Code Ann. § 22-5-404], and to eliminate any questions as to the intent thereof;”

The 1953 amendments resulted in the statute in its present form.

As originally enacted, the statute included a procedure whereby the riparian owner could obtain a deed from the State of Arkansas for such lands:

“The Commissioner of State Lands is hereby empowered and authorized to execute deeds to such lands to riparian owners upon application and the filing of proof of record ownership of adjacent lands and proof of proper survey of said lands, conveying all the right, title, and interest of the State of Arkansas to such lands as have emerged or may hereafter emerge to the mean high water mark of any such stream or lake.”

The latter section is now codified at Ark. Code Ann. § 22-5-405 (Repl. 1996).

When the Arkansas Code of 1989 was adopted, the reference to “such lands” was changed to “lands described in § 22-5-404.”

Surprisingly, there are few cases in which this statute is interpreted or applied. In those cases, however, there is no suggestion that the statute modifies the case law definitions of, and distinctions between, accretion and avulsion. See, e.g., Porter v. Arkansas Western Gas Company, 252 Ark. 958, 482 S.W. 2d 598 (1972). Indeed, the cases appear to accept the statute as having been enacted for the sole purpose of providing a means for riparian landowners to obtain record title from the State of Arkansas to lands that have been formed by accretion in the beds of formerly navigable waterways.

Having said that, I would also suggest to you that this statute could be read as a legislative adoption of the “accretion exception” rule described in subparagraph (C) above. Indeed, particularly in view of the preamble to the 1953 amendments, I don’t see how you could read the statute any other way.

Other than to the extent the statute may constitute a legislative adoption of the “accretion exception” rule, it appears to me to be consistent with the common law definitions of, and distinctions between, accretion and avulsion, and the cases are consistent with this reading. In any event, those of you who encounter riparian rights issues need to be aware that this statute exists, as it provides a means of obtaining a deed from the State of Arkansas for accretions to riparian lands adjoining formerly navigable waterways.

E. Apportionment of Alluvion

Assuming land has formed by accretion, the next question which is encountered is the problem of dividing the alluvion among the riparian owners. In Malone v. Mobbs,

102 Ark. 542 (1912), the Arkansas Supreme Court adopted the following rule for dividing alluvion:

“This rule is laid down for the division of alluvion between the contiguous riparian proprietors – First: To measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards or feet each riparian proprietor owned on the riverline; Second: Supposing the former line for instance to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line, as he owned rods on the old; then, to complete the division, lines are drawn from the points at which the proprietors respectively bounded on the old to the points thus determined as the points of division of the newly formed shore.”

The Court went on to note that there may be peculiar circumstances in which use of this rule would be inequitable, and that in appropriate circumstances the application of this rule might be appropriately modified by a court of equity. Nevertheless, this remains the general rule in Arkansas. See, e.g., Hamilton v. Horan, 193 Ark. 85 (1936).

V. Boundary Lines

A. Navigable Waters – Ordinary High Water Mark

As I mentioned in the historical background at the beginning of this paper, for navigable waters the English common law fixed the boundary between the king’s ownership of navigable waterways and riparian owners at the high water mark, i.e., high tide. Arkansas has adopted this rule by fixing the line at the ordinary high water mark. St. Louis, Iron Mountain & Southern Railway Company v. Ramsey, 53 Ark. 314 (1890). In that case, in discussing where the ordinary high water mark was to be located, the Court stated that “what the river does not occupy long enough to rest from vegetation, so far as to destroy its value for agriculture, is not river bed.” The Court also said that “the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable

from the bank by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water.” A later case held that the line is to be found by “ascertaining where the presence and action of water are so usual and long-continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation and the nature of the soil.” State ex rel. Thompson v. Parker, 132 Ark. 316 (1917). This definition has remained unchanged to the present.

In passing, I note that since the states own to the high water mark, they can adopt their own rules as to where the line is to be drawn. For example, Tennessee fixes the boundary at the ordinary low water mark. Arkansas v. Tennessee, 246 U.S. 158, 38 S. Ct. 301 (1917).

B. States and Counties, and the Rule of the Thalweg

Where a river forms the boundary line between two states or two counties, the states or counties are, in effect, riparian owners on opposite banks. If you ask people for their knee-jerk reaction to the question of where the boundary should be between the two, the vast majority are of the opinion that the boundary line is the exact middle of the river, equidistant between the two banks. This is absolutely wrong.

In the case of Arkansas v. Tennessee, 246 U.S. 158, 62 L. Ed. 638, 38 S. Ct. 301 (1917), the United States Arkansas Supreme Court fixed the boundary line between the States of Arkansas and Tennessee. The Court began by summarizing European law concerning waters that formed the boundary between two sovereign nations. Under European law, the boundary line was fixed at the middle of the navigable channel, or thalweg (literally, the “valley way”). If you stop to think about it, the rule makes sense.

The navigable channel moves back and forth, sometimes adjacent to one bank, sometimes adjacent to the other. If the boundary line were the exact middle, neither nation could make use of the navigation channel, without trespassing upon the other's lands. Putting the boundary in the exact middle of the deepest part of the channel gave each nation an equal right to use the waterway. The United States Supreme Court found the reasoning sound, and therefore adopted the rule of the thalweg as the principle to be utilized in fixing the boundary between the States of Arkansas and Tennessee. This same rule was later applied to a dispute between Arkansas and Mississippi, Arkansas v. Mississippi, 250 U.S. 39, 63 L. Ed. 832, 39 S. Ct. 422 (1919).

Arkansas has adopted this same rule for fixing the location of the boundary line between counties. See Gill v. Porter, 248 Ark. 140, 450 S.W.2d 306 (1970); McGee v. Matthews, 241 F. Supp. 300 (E.D. Ark. 1965).

The general rules of accretion and avulsion also apply to the boundary lines between states and counties. Arkansas v. Tennessee, *supra*; Arkansas v. Mississippi, *supra*; DeLoney v. State, 88 Ark. 311, 115 S.W. 138 (1908); Adkisson v. Starr, 222 Ark. 331, 260 S.W.2d 956 (1953); Gill v. Porter, *supra*.

One *caveat* is in order. When determining the boundary between states and counties, it is important to examine the treaty, statute, or constitutional provision which creates the state or county. If the enabling legislation clearly provides, the boundary can be fixed at one bank or the other, rather than the thalweg. For example, the boundary between Arkansas and Texas is the south bank of the Red River, not the thalweg. See, DeLoney v. State, *supra*. Similarly, in Gill v. Hedgecock, 207 Ark. 1079, 184 S.W.2d

262 (1944), the Arkansas Supreme Court noted *in dicta* that the statute creating Little River County fixed the northern boundary line at the north bank of the Little River.

C. Non-Navigable Waters

The cases I have read discussing 18th century English law uniformly speak in terms of the “middle” or “center” when discussing the location of the boundary between riparian owners on non-navigable waters. The early Arkansas cases are a mix of this definition and something that sounds like the rule of the thalweg. Compare Kilgo v. Cook, 174 Ark. 432 (1927) (“the middle or thread of the stream”) with McGahvey v. McCollum, Administrator, 207 Ark. 180, 179 S.W.2d 661 (1944) (“the riparian owner upon a non-navigable stream takes to the center of it.”). The more recent cases, however, very clearly hold that the rule of the thalweg applies to non-navigable waterways also. See, e.g., Gill v. Porter, 248 Ark. 140, 450 S.W.2d 306 (1970).

D. “Fencing” Water

As odd as it sounds, Arkansas law allows riparian owners on non-navigable waterways to “fence” their water. In Medlock v. Galbreath, 208 Ark. 681, 187 S.W.2d 545 (1945), a riparian landowner sought an injunction, excluding commercial fishermen from floating their boats over his land. The Court there held that while the land itself belonged to the riparian owner, the fish (and presumably the water) did not. The Court therefore allowed the fishermen to continue using the waters for their commercial fishing operation. The Court expressly noted, however, that the landowner had made no effort to enclose his lands with any kind of floating boom or fence. In this regard, the Arkansas court cited with approval a Pennsylvania decision in which the Pennsylvania court held, clearly and in so many words, that a riparian owner can in fact enclose the waters over his

land, and upon doing so, the courts will uphold his right to exclude the public from the waters overlying his land.

This is still good law in Arkansas. In this regard, I refer you back to the case of State v. McIlroy, *supra*, discussed in the section of this paper dealing with navigability. If Medlock v. Galbreath were not the law of Arkansas, the McIlroy decision would have been unnecessary. Indeed, in McIlroy the Arkansas Supreme Court noted that the chancellor in the trial below had held that the riparian property owners had “the incidental right to prevent the public from using the stream.” Id. at 229. The Arkansas Supreme Court did not quarrel with this conclusion of the chancellor, but rather accepted it at face value and went on to reverse his decision by finding the river navigable, rather than by modifying the rule of law announced in Medlock v. Galbreath, *supra*.

VI. Emerging Lands

A. The General Rule

In its strictest sense, the phrase “emerging lands” refers to a situation where the land of a riparian owner has been completely submerged by the gradual movement of a river in one direction, then re-emerges when the river moves back in the opposite direction. This exact fact pattern was confronted by the Arkansas Supreme Court in Younts v. Crockett, 238 Ark. 971, 385 S.W.2d 928 (1965). In that case, Crockett owned land platted as Lot 1, and Younts owned land platted as Lot 5. Lot 1 was a narrow strip of land bordered on one side by the Arkansas River and on the other by Lot 5. The Younts contended that the Arkansas River had gradually shifted until it completely submerged all of Lot 1, and that the river thereafter gradually shifted back in the other direction until it had returned to its former boundary. The Younts claimed these newly

formed lands as accretions to Lot 5. The Crocketts, on the other hand, claimed that Lot 1 had never been completely submerged, and that the newly formed lands were therefore accretions to Lot 1.

The Arkansas Supreme Court held in favor of the Crocketts, primarily on the ground that the Younts, as plaintiffs, had the burden of proof, and they had not proven that the river had shifted to the point that Lot 1 had been wholly engulfed by the bed of the river. In reaching this decision, however, the Arkansas Supreme Court announced very clearly that if it could be shown that the river had shifted to the point that Lot 1 was completely submerged, it would cease to exist, and if accretions formed thereafter, they would be accretions to Lot 5, and would not belong to the former owners of Lot 1.

“If the gradual westward movement of the river’s channel finally submerged Lot 1, so that it was wholly engulfed by the shifting bed of the river, Lot 1 went out of existence. In that event the tract now in dispute would have re-emerged as an accretion to Lot 5. (Citation omitted). On the other hand, if the western boundary of Lot 1 was submerged only by temporary overflows that did not last long enough to establish a new high water mark as that term is defined in our cases, Lot 1 was not destroyed. (Citation omitted).

Other states would reach a contrary result on these facts. See, e.g., Choctaw and Chickasaw Nations v. Tibbetts, 430 F. Supp. 714 (E. D. Okla. 1976) (applying Oklahoma law); Bonelli Cattle Company v. Arizona, 414 U.S. 313, 94 S. Ct. 517 (1973) (applying federal law). This is still good law in Arkansas, however.

It is also worth mentioning A.C.A. of 22-5-403 (Repl. 1996) again. I read the statute as being consistent with the decision in Younts, although no case has ever discussed this point.

B. Islands

A completely different set of rules applies where the “emerging lands” are in the form of an island. Arkansas has adopted two statutes concerning islands that form in navigable waterways. The earlier statute provides that where islands form in navigable waterways within the boundaries of a former owner, such islands belong to the former owner.

“All land which has formed or may form in the navigable waters of this state, and within the original boundaries of a former owner of land upon such waters, shall belong to and the title thereto shall vest in the former owner, his heirs or assigns, or in whoever may have lawfully succeeded to the right of the former owner therein.” Ark. Code Ann. § 22-5-403 (Repl. 1996).

This statute does not apply to accretions to the mainland, but rather concerns only islands. Grav v. Malone, 142 Ark. 609, 219 S.W. 742 (1920). Also, this statute is limited to that portion of an island that forms within the boundaries of a former owner. If the island extends by accretion outside the former boundaries, the usual rules of accretion do not apply; ownership stops at the former boundary. Mills v. Prothro, et al., 143 Ark. 117, 219 S.W. 1017 (1920). Presumably, if the island initially formed outside the boundaries of the former owner, but extended by accretion across the former boundary, the former owner would own the accretions to the island which formed within his original boundaries.

The second statute is Ark. Code Ann. § 22-6-202(A) (Repl. 1996). That statute provides:

“All islands formed or which may form in the navigable waters of this State are declared to be the property of the State”

One would think, upon reading this statute and § 22-5-403, that the two statutes are mutually exclusive. The Arkansas Supreme Court, however, has held that they are not. Ward v. Harwood, 239 Ark. 69, 387 S.W. 2d 318 (1965). In that case, the Arkansas Supreme Court held that § 22-6-202 applies only to islands that form in navigable waterways, outside the boundaries of a former owner.

In regard to islands forming in non-navigable waterways, the only question is determining the location of the thalweg. See, e.g., Goforth v. Wilson, 208 Ark. 33, 184 S.W.2d 814 (1945), in which the litigation concerned ownership of an island. The proof established that historically the main channel of the river had been on the south side of the island, while there had been only a slough on the north side of the island, completely submerged only during times of high water. By the time of trial, however, the proof established that the main channel of the river had shifted to the north side of the island, such that only a slough was left on the south side, again fully submerged only in times of high water. After accepting that the movement was due to accretion, the court there held that ownership of the island was determined by ascertaining which side of the main channel the river was located on.

In the situation where accretions to an island and the mainland grow until they join, the owners of the island and the owners of the mainland take to the point where they join. Cummings v. Boyles, 242 Ark. 38, 411 S.W.2d 665 (1967). Also, I again refer you to Ark. Code Ann. § 22-5-404 (Repl. 1996). The statute may have some relevance to islands, depending on the specific facts.

VII. What Happens to Severed Minerals?

There are no Arkansas cases which address the question of what happens to severed minerals, when surface boundaries move due to accretion. Oklahoma, Montana, and Texas, however, have each held that severed minerals move with the surface estate. Nilsen v. Tenneco Oil Company, 614 P.2d 36 (Okla. 1980); Jackson v. Burlington Northern, Inc., 205 Mont. 200, 667 P.2d 406 (1983); Ely v. Briley, 959 S.W.2d 45 (Tex. 1998). The result in these cases has been criticized in two Law Review articles, Murphree, "*Oil and Gas: The Inapplicability of Accretion to Severed Mineral Estate*," 34 Okla. L. Rev. 826 (1981), and Kimball, *Accretion and Severed Mineral Estates*, 53 Univ. of Chic. L. Rev. 232 (1986).

VIII. Miscellaneous Issues

A. Conveyances by the United States Prior to Statehood

In Section I of this paper, I noted that the original thirteen colonies acquired title to navigable waterways upon declaring their independence from Great Britain, as the sovereign successors to the English crown. When subsequent states were admitted, they acquired the same rights to navigable waterways, under the "equal footing" doctrine. At the same time, however, most subsequently admitted states, to include Arkansas, acquired their title from the United States of America. The question therefore arises: Was it possible for the United States to convey the title of navigable waterways to third parties, prior to statehood? The answer to this question is yes, although the circumstances in which this arises are very limited.

In the case of Choctaw Nation v. Oklahoma, 397 U.S. 619, 90A S. Ct. 1328 (1970), the Choctaw, Chickasaw, and Cherokee Nations asserted title to the bed of the

Arkansas River from the head of navigation at the confluence of the Grand and Arkansas Rivers in northeast Oklahoma downstream to the Arkansas border. The case includes a fascinating discussion of the history of riparian rights and Indian law, particularly the various treaties between the United States and the five civilized tribes. In the end, the United States Supreme Court concluded that by virtue of various treaties, principally the Treaty of Dancing Rabbit Creek, the United States had effectively conveyed fee title to a navigable waterway (the Arkansas River) to the Indian Nations. Thus, when Oklahoma was later admitted as a state, it did not acquire title to the bed of the navigable portion of the Arkansas River.

Since the Choctaw decision, there have been no other cases decided in which the Supreme Court has held that the United States did in fact convey fee title to navigable waterways to a third party prior to statehood. Indeed, in Utah Division of State Lands v. The United States, 482 U.S. 191, 96 L. Ed. 2d 162, 107 S. Ct. 2318 (1987), the Supreme Court noted that the Choctaw decision was the sole case in which this result was reached. Nevertheless, the decision does establish that it is at least possible that the United States conveyed the title to the bed of a navigable waterway to a third party, prior to statehood, and that the state therefore does not own it. I do not know of any instance in which this occurred in Arkansas, but if by chance you encounter a Patent from the United States which purports to convey the bed of a navigable waterway to an individual, prior to statehood, you should at least recognize that the individual may have a valid claim to the bed of the waterway.

One interesting footnote to the Choctaw case is the position the Indian Nations are presently taking. As I understand it, the Indian Nations are now contending that they

own the bed of the river, not only where it is presently located, but anywhere it has ever been located at any time in the past, to include property that has been dry land for many years. I anticipate it will be interesting to watch the development of these claims, particularly in light of the fact that the Indian Nations cannot be made a party to litigation without their consent.

B. State Law Does Not Always Govern

One practical effect of the acquisition of title to navigable waterways upon statehood is that state law governs all disputes and controversies over ownership of navigable waterways. See Arkansas v. Tennessee, *supra*. Where the riparian owner is the United States of America, however, this general rule does not apply.

In California ex rel. State Lands Commission v. United States, 457 U.S. 273, 73 L. Ed. 2d 1, 103 S. Ct. 14 (1982), the United States owned a Coast Guard station on riparian lands bordering navigable waterways, the bed of which was owned by the State of California. The federal government built dikes and revetments for navigation purposes, which had the practical effect of causing accretions to the Coast Guard station land. California law would have held that the lands belonged to the State of California, as the accretions were the result of artificial rather than natural causes. The United States Supreme Court, however, held that federal law governed in this particular circumstance, and that under federal law, the accretions belonged to the riparian landowner, the United States.

The point to be made here is that if you encounter a situation in which the United States is the riparian landowner, you should be conscious of the fact that you may be playing by a different set of rules.

C. Payment of Taxes and Adverse Possession

The payment of taxes on riparian lands amounts to payment of taxes on accretions to such land. River Land Company v. McAlexander, 10 Ark. App. 123, 661 S.W.2d 451 (1983). At the same time, however, Arkansas would apparently hold that adverse possession of riparian lands does not necessarily include accretions to that land. See.e.g., Sherman v. Chicago Mill and Lumber Company, 233 Ark. 277, 344 S.W.2d 345 (1961), in which the court held that Sherman had established title to an island by adverse possession, and River Land Company v. McAlexander, *supra*, in which the court held that the decision in Sherman only vested title in the adverse possessor to the bank, and that the adverse possessor was therefore not a riparian owner entitled to accretions. This doesn't seem to make any sense, but that is the holding of the cases.

Although it sounds odd, by building a dam and permanently flooding private property, the Arkansas Supreme Court has held that the state can adversely possess private land. State ex rel. Thompson v. Parker, 132 Ark. 316 (1917). I can't imagine this result would ever be reached today, particularly in light of the due process clause and Ark. Code Ann. Sec 22-5-404. Nevertheless, in 1917, the Arkansas Supreme Court so held.

With the exception of these minor points, the usual principles of adverse possession are equally applicable to riparian ownership. Sherman v. Chicago Mill and Lumber Company, *supra*.

D. Conveyancing Rules

Arkansas adheres to the general rule that conveyances of riparian lands are presumed to include any accretions thereto, whether accurately described in the deed or

not. Gill v. Hedgecock, 207 Ark. 1079, 184 S.W.2d 262 (1944). This is not to say that a conveyance, if sufficiently clear, cannot reserve or except accretions, exclude the bed of the waterway, or make the bank the boundary. To the contrary, if the intent is clear, it will be given effect. See, e.g., Kilgo v. Cook, 174 Ark. 432 (1927); Perry v. Sadler, 76 Ark. 43 (1905).

1 August 1982

STREAMS CONSIDERED NAVIGABLE
IN LITTLE ROCK DISTRICT
("NAVIGABLE WATERS OF THE U.S.")

Stream	Tributary of	Head of navigation	Navigable length in LRD miles, approx.	Total navigable length miles approx
Arkansas River	White River	Mouth of Grand (Neosho) River, Oklahoma (Head of Nav. not in LRD)	303	391
White River (mile 0+010 and 255 to 686)	Mississippi River	Goshen, AR (Hwy 45 Bridge) 31-17-28W, Washington Co., AR (Portion of White Riv. between McClellan-Kerr Ark Riv Nav System Lock #1 and mile 10, and Newport, Ark, at mile 255 are under jurisdiction of Memphis District)	441	686
Black River	White River	Mengo, MO (Mo-Pac R.R. Bridge) 22-25N-6E, Butler Co., MO	218	218
Big Maumelle River	Arkansas River	Lake Maumelle Dam 34-3N-14W, Pulaski Co., AR	6	6
Buffalo River	White River	Mouth of Rush Creek 11-17N-15W, Marion Co., AR	22	22
Cadron Creek	Arkansas River	Pleasant Valley, AR (Mouth East Fork) 9-6N-14W, Faulkner Co., AR	8	8
Current River	Black River	Van Buren, MO (Hwy 60) 24-27N-1W, Carter Co., MO	90	90
Eleven Point River	Spring River	Bardley, MO (Hwy 160) 19-23N-2W, Oregon Co., MO	54	54
Fourche Creek	Arkansas River	Little Rock, AR 16-N-12W, Pulaski Co., AR	9.2	9.2
Fourche LaFave River	Arkansas River	Perryville, AR (Hwy 9) 15-4N-17W, Perry Co., AR	26	26

STREAMS CONSIDERED NAVIGABLE
IN LITTLE ROCK DISTRICT
("NAVIGABLE WATERS OF THE U.S.")
(continued)

Stream	Tributary of	Head of navigation	Navigable length in LRD miles, approx.	Total navigable length in miles, approx.
Greers Ferry Lake	Little Red River	Dam to Devils Fork mile 11.5 (Lat 92°02'N) NE3-11N-10W, Cleburne Co., AR Middle Fork mile 10.5 (92°15', 35°39') NW NE 27-12N-12W, Van Buren Co., AR and South Fork mile 21.5 (92°26', 35°34') NW NW 25-11N-14W, Van Buren Co., AR	71	71
Illinois Bayou	Arkansas River	Shiloh, AR (Russellville Water Supply Dam) SE SW 17-8N-20W, Pope Co., AR	12	12
Lake Langhofer	Arkansas River	Pine Bluff, AR (Cutoff Dam) 16-5S-9W, Jefferson Co., AR	5	5
Lee Creek	Arkansas River	Van Buren, AR SW SW 4-9N-32W, Crawford Co., AR	6	6
Little Maumelle River	Arkansas River	Pinnacle, AR (Hwy 300 Bridge) 3-2N-14W, Pulaski Co., AR	8.6	8.6
Little Red River	White River	Bee Rock, AR SE SW 36-8N-7W, White Co., AR	31	31
Mulberry River	Arkansas River	Mulberry, AR (I-40 Bridge) 24-10N-29W, Franklin-Crawford Co., AR	6	6
North Fork River -Norfork Lake	White River	Dawt, MO (Unnamed Road Crossing) 3-22N-12W, Ozark Co., MO	50	50
Petit Jean River	Arkansas River	Rocky Crossing, AR (Hwy 7) 23-5N-21W, Yell Co., AR	24	24
Spring River	Black River	Sloan, Arkansas South Line Sec 25, North Line Sec 36-18N-2W, Lawrence-Randolph Co., AR	8	8

1 August 1982

STREAMS CONSIDERED NAVIGABLE
IN LITTLE ROCK DISTRICT
("NAVIGABLE WATERS OF THE U.S.")
(continued)

Stream	Tributary of	Head of navigation	Navigable length in LRD miles, approx.	Total navigable length in miles, approx.
Little River	Red River	Millwood Dam	16	16
Red River		Navigable from Fulton, AR (463.0) to Index, AR (485.3) in Little Rock District. Intermittent portions in other Districts are also navigable, both upstream and downstream	22.3	



State of Arkansas Commissioner of State Lands

Charlie Daniels
Commissioner

March 29, 1999

Mr. Robert M. Honea
HARDIN, JESSON & TERRY
Attorneys at Law
P.O. Box 10127
Fort Smith, AR 72917-0127

RE: Cutoff

Dear Mr. Honea:

For your review, I enclose a copy of Attorney General Mark Pryor's Opinion issued in response to Commissioner Daniels' request dated December 21, 1998. As anticipated, the opinion does not answer the ultimate question of ownership, however, it does provide an excellent outline of relevant statutory and case law.

Having thoroughly reviewed the opinion, the Commissioner's current position is that the state holds title to the Cutoff. As the opinion correctly points out, the issue of title to beds of navigable rivers is fact intensive. Consequently, prior to divesting the state of ownership, certain facts must be unequivocally established. The situation addressed in your letter actually creates two separate fact situations in that your description of the property refers to both dry land and land that is currently under water.

In the latter case, pursuant to Arkansas Code Annotated Section 22-5-405, the dry land created from the river bed may be subject to conveyance by the state to the riparian landowners assuming certain facts are proved. Accordingly, a statutory scheme exists for the determination of ownership in cases involving dry land in abandoned river channels. On the other hand, however, there is no clear statutory scheme for determining the navigability of a waterway which is the issue created by the land that is currently still underwater. Ownership to this land rests on the issue of navigability. The Commissioner is neither equipped nor empowered to determine whether waterways are navigable and therefore relies on determinations made by the U.S. Corps of Engineers. Obviously, there has been a determination that the Arkansas River is navigable. Consequently, until proven otherwise, the Commissioner of State Lands can only assume that waterways created by the river are navigable as well.

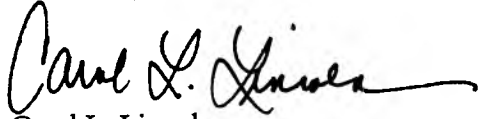
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I am hopeful the above adequately sets forth Commissioner Daniels' position on this matter. Should you have any questions, or, wish to discuss this subject further, please feel free to call me.

Yours very truly,

A handwritten signature in black ink, appearing to read "Carol L. Lincoln", with a long, sweeping horizontal line extending to the right.

Carol L. Lincoln
Staff Attorney
Commissioner of State Lands

CLL/lp



RECEIVED

MAR 08 1999

Comm. St. 1999

ATTORNEY GENERAL OF ARKANSAS
Mark Pryor

March 5, 1999

The Honorable Charlie Daniels
Commissioner of State Lands
State Capitol
Little Rock, Arkansas 72201

Dear Mr. Daniels:

This is in response to your request for an opinion regarding the ownership of certain land located in the Arkansas River. Specifically, you have enclosed a copy of a letter from a Fort Smith attorney asking whether the State "claims title to the former beds of the Arkansas River which were cut off as a result of the channelization of the river by the Corps of Engineers in the 1960s." The letter refers to an area known as the "Cutoff," which is described in the letter as "literally a channel created by the Corps of Engineers into which the body of the Arkansas River was diverted. The letter notes that "[t]he former bed of the Arkansas River which was cut off by this channel was described as the

"The letter continues by stating that: "the former bed of the Arkansas River commonly described as was completely cut off as a result of the channelization, i.e., there is now no access to it from the Arkansas River with the possible exception of extreme flooding conditions. Portions of the former bed of the river are now dry land; other portions remain underwater." The letter poses the following question to your office, which you have now forwarded for my opinion:

Given the foregoing facts, does the State of Arkansas claim title to the oil, gas, and minerals underlying the bed of the Arkansas River as it was formerly located before it was cut off by the channelization of the

Mr. Charlie Daniels
Commissioner of State Lands

Page 2

Arkansas River? In responding to this inquiry, I specifically refer you to the following cases:

Porter v. Arkansas Western Gas, 252 Ark. 958, 482 S.W.2d 598 (1972); United States of America v. Keenan, 753 F.2d 681 (8th Cir. 1985).

You state that "[i]n reviewing the information provided, as well as relevant case law, it would appear that if the Cutoff¹ is no longer navigable, then ownership of the channel would revert to the riparian owners and the state would no longer claim it." You state that you are reluctant, however, to issue your opinion on this matter, particularly as it relates to oil and gas rights, as the "Natural Resources Commission" has "exclusive authority over the leasing of oil and gas rights owned by the state."² You therefore ask my opinion "in response to the inquiry [the letter of the attorney] enclosed."

I must note in response to your request that the question posed by the Fort Smith attorney ("[w]hether or not [the state] claims title to the former beds of the Arkansas River"), is not a question of law upon which I can issue a formal legal opinion.

The underlying question is whether the State of Arkansas owns title to the bed of the . . . Questions involving the title to beds of navigable rivers are fact intensive. See e.g. 65 C.J.S. *Navigable Waters*, § 3. In the issuance of official legal opinions, I am not empowered or equipped to act as a factfinder, and to

¹ It appears that it is the land underlying the . . . at issue.

and not the "

Cutoff," which is

² This Committee is created at A.C.A. § 22-5-804, and is composed of the Director of DF&A or his designee, the Director of the Oil and Gas Commission, The State Geologist, the State Forester, the Director of the Arkansas Soil and Water Conservation Commission, the Commissioner of State Lands, the Director of the State Game and Fish Commission, the Director of the Department of Parks and Tourism or his designee, the Director of the Arkansas Department of Pollution Control and Ecology, and the Director of the Natural Heritage Commission. The only statutory powers granted the Committee appear to be the establishment of a schedule of minimum fees and royalties, as well as the terms and conditions for various types of permits and leases, and the changing of such schedule and terms. See A.C.A. § 22-5-804 (c) and (d). It appears that you, as Commissioner of State Lands, have the authority to actually grant leases and permits for the taking of oil and gas from the beds of navigable waters and other state lands. See A.C.A. § 22-5-801.

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definitively determine an issue based upon a statement of the facts given by one party to the dispute (such as posed in the letter enclosed with your request).

In an effort to be helpful, however, I can set out the relevant law on the topic, which may then be applied to the facts as you find them.

The State of Arkansas, of course, owns title to the beds of all navigable waterways within the state. *See Hayes v. State*, 254 Ark. 680, 496 S.W.2d 372 (1973); *Clarke v. Montgomery County*, 268 Ark. 942, 597 S.W.2d 96 (Ark. App. 1980); *McGahhey v. McCollum*, 207 Ark. 180, 179 S.W.2d 661 (1944); *Barboro v. Boyle*, 119 Ark. 377, 178 S.W. 378 (1915); *State v. Southern Sand & Material Co.*, 113 Ark. 149, 167 S.W. 854 (1914). It has been stated that:

When the Original Colonies ratified the Constitution, they succeeded to the Crown's title and interest in the beds of navigable waters within their respective borders. *See Utah Division of State Lands v. United States*, 482 U.S. 193, 195-96, 107 S.Ct. 2318, 2320-21, 96 L.Ed.2d 162 (1987); *Bonelli Cattle Co., v. Arizona*, 414 U.S. 313, 317-318, 94 S.Ct. 517, 521-522, 38 L.Ed.2d 526 (1973), *overruled on other grounds*, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed. 2d 550 (1977). Under the equal footing doctrine, new states were admitted with 'the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders.' *Bonelli*, 414 U.S. at 318, 94 S.Ct. at 522. Accordingly, title to lands beneath navigable waters passed from the federal government to the states upon their admission to the Union.

101 Ranch v. U.S., 905 F.2d 180, 182 (8th Cir. 1990).

This is true assuming there had been no valid federal grant of particular land to an individual prior to the state's admission to the Union. *Utah Division of State Lands v. United States*, *supra*.

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While the application of the "equal footing doctrine" to the states at the time of their admission to the Union requires reference to and construction of federal law, thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State. *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982) and *Corvallis, supra*. State law will therefore control the question of whether the State of Arkansas has been divested of title to the property in question. *Id.*

Arkansas law on the subject is derived from both statutes and the common law. The most relevant Arkansas statute is A.C.A. § 22-5-404 (Repl. 1996), which is the codification of two Acts of Arkansas, Acts 1945, No. 203 and Acts 1953, No. 126. The statute currently provides as follows:

(a) The title to all lands which have formed or may form in the beds of nonnavigable lakes, or in abandoned river channels or beds, whether or not still navigable, which reformed lands or alluvia are above the ordinary high-water mark, shall vest in the riparian owners to the lands and shall be assessed and taxed as other lands.

(b) The lands referred to in subsection (a) of this section shall include those lands which have emerged or which may emerge by accretion, reliction, evaporation, drainage, or otherwise from the beds of lakes or from former navigable streams, whether by natural or artificial causes, or whether or not the lakes were originally formed from the channel or course of navigable or nonnavigable streams.

The original Act 203 of 1945 applied only to lands emerging from nonnavigable lakes. The 1953 act expanded the section to include the language about abandoned river channels. In fact, the preamble to Act 126 of 1953 recites the following:

WHEREAS many cut-offs have been made in the Mississippi river, and other rivers in the State of Arkansas, both naturally and artificially for the

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purpose of controlling the current of the river and the bank stabilization, and many old former river beds have remained as the result of such cut-offs and have gradually built up and reached the high-water mark as defined by the Supreme Court of Arkansas in the case of *St. Louis, Iron Mountain & Southern Railway Co. v. Ramsey*, 53 Ark. 314, 13 S.W. 931, and permanent timber vegetation has grown on all or part of said old abandoned river beds, and

WHEREAS it is intended hereby to clarify the intent of Act 203 of the General Assembly approved March 8, 1945, and to eliminate any question as to the intent thereof;

THEREFORE, Sections 1 and 2 of Act 203 of the 1945 General Assembly are hereby respectively amended to read as follows

It has been stated that Act 126 of 1953 "was designed to furnish a means whereby the State could acknowledge that a river bed has been abandoned." *Gill v. Porter*, 248 Ark. 140, 450 S.W.2d 306 (1970).

The 1953 act left unamended sections 3 and 4 of the original 1945 act, which authorize the State Land Commissioner to execute deeds to the lands described in the statute to adjacent riparian landowners assuming certain listed conditions are met. See current A.C.A. § 22-5-405. (Repl. 1996). A survey of the lands in question is required. A.C.A. § 22-5-405(a) and (b). The land at issue must have emerged to the "mean high-water mark of any such stream or lake." A.C.A. § 22-5-405 (a). Affidavits must be filed to this effect and must state that the lands are "capable of cultivation." See A.C.A. § 22-5-405(d).

Although there is no case precisely on point, it appears that the statute applies notwithstanding the fact that the land emerged from an artificial cause, or from what might be termed in the common law an "avulsive," rather than an "accretive" event. The statute, *at least as regards the state's title*, appears to change what is the generally accepted common-law rule that land exposed by an avulsion will not operate to change ownership or the boundary of a given tract, while land formed

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by an accretion will. See e.g. 65 C.J.S. *Navigable Waters*, §§ 82 and 86 (b). See also, *Horne v. Howe Lumber Co.*, 209 Ark. 202, 190 S.W.2d 7 (1945), and *Garrett v. State*, 118 N.J. Super. 594, 289 A.2d 542 (1972). The statute includes lands which have emerged from natural or artificial causes, by "accretion, reliction, evaporation, drainage, or otherwise. . . ." A.C.A. § 22-5-405 (b) (emphasis added). The statute, as it relates to the rights of private riparian owners as against each other, appears to have been applied in conjunction with the common law doctrines of accretion and avulsion to determine the appropriate boundary.³ See e.g., *Porter v. Arkansas Western Gas Co.*, 252 Ark. 958, 482 S.W.2d 598 (1972) and *Gill v. Porter*, 248 Ark. 140, 450 S.W.2d 306 (1970). See also, *United States v. Keenan*, 753 F.2d 681 (8th Cir. 1985).

Clearly, this statute was intended to allow the state to divest itself of title to lands emerged from a river bed after the construction of a "cut-off." The statute only applies, however, to "lands" which have emerged to the high water mark. It does not appear to apply to lands still under water. The letter enclosed with your request indicates that "[p]ortions of the former bed of the river are now dry land; other portions remain underwater."

As regards lands still underwater, or below the ordinary high water mark, common law principles must be applied. It is held in Arkansas, in contrast to the majority of states, that because the state's title to the land under water rests on navigability, when the navigation ceases the title terminates, and riparian rights attach. See *Parker, Commissioner of Revenue v. Moore*, 222 Ark. 811, 262 S.W.2d 891 (1953), relying on *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906). See also *United States v. Keenan*, *supra*; *Gill v. Porter*, *supra*; *Porter v. Arkansas Western Gas Co.*, *supra*, and *Five Lakes Outing Club v. Horsehoe Lake Protective Association*, 226 Ark. 136, 288 S.W.2d 942 (1956). Compare 65 C.J.S. *Navigable Waters*, § 97. A determination, therefore, of the title to the lands still under water will require a finding as to the water's navigability. This is an inherently factual question. If no longer "navigable," Arkansas common law provides that riparian

³ It appears, additionally, that the doctrines of accretion and avulsion are still relevant for determining any county boundary issues arising from the subject property. See e.g. *Addison v. Starr*, 222 Ark. 331, 260 S.W.2d 956 (1953); *Deloney v. State*, 88 Ark. 311, 115 S.W. 138 (1908); and *Matthews v. McGee*, 358 F.2d 516 (8th Cir. 1966). The correspondence enclosed with your request indicates that the subject property is located in "Crawford and Sebastian Counties." The Arkansas River is the boundary between those counties. See *Fulton Ferry & Bridge Co. v. Blackwood*, 173 Ark. 645, 293 S.W. 2 (1927).

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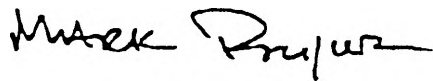
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ownership attaches at the time the waters became nonnavigable. *See Keenan, supra, and Gill v. Porter, supra.*

While I cannot provide a definitive resolution of the question posed, I hope the foregoing recitation of the law is helpful in your approach to this issue.

Senior Assistant Attorney General Elana C. Wills prepared the foregoing opinion, which I hereby approve.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Pryor", with a stylized flourish at the end.

MARK PRYOR
Attorney General

MP:ECW/cyh

22-5-403. Title to lands formed in navigable waters.

(a) All land which has formed or may form in the navigable waters of this state, and within the original boundaries of a former owner of land upon such waters, shall belong to and the title thereto shall vest in the former owner, his heirs or assigns, or in whoever may have lawfully succeeded to the right of the former owner therein.

(b) Nothing in this section shall be construed to affect the rights or interests of third parties in any such land acquired before the passage of this section.

22-5-404. Title to lands formed in nonnavigable lakes or abandoned river channels.

(a) The title to all lands which have formed or may form in the beds of nonnavigable lakes, or in abandoned river channels or beds, whether or not still navigable, which reformed lands or alluvia are above the ordinary high-water mark, shall vest in the riparian owners to the lands and shall be assessed and taxed as other lands.

(b) The lands referred to in subsection (a) of this section shall include those lands which have emerged or which may emerge by accretion, reliction, evaporation, drainage, or otherwise from the beds of lakes or from former navigable streams, whether by natural or artificial causes, or whether or not the lakes were originally formed from the channel or course of navigable or nonnavigable streams.

22-5-405. Deeds to lands in lakes or rivers.

(a) The Commissioner of State Lands is empowered and authorized to execute deeds to lands described in § 22-5-404 to riparian owners upon application and the filing of proof of record ownership of adjacent lands and proof of proper survey of the lands, conveying all the right, title, and interest of the State of Arkansas to lands as have emerged or may emerge to the mean high-water mark of any such stream or lake.

(b) All applicants for deeds under this section shall, upon filing an application therefor, deposit with the Commissioner of State Lands the estimated cost of survey of the lands to be fixed by the Commissioner of State Lands. He shall thereupon direct the county surveyor of the county in which the lands are located, or some other competent surveyor to be selected by the Commissioner of State Lands, to accurately survey the lands and compile the field notes and plat the lands in reference to the survey of adjacent lands, by the extension of township, range, and section lines, and to file the field notes and plats in the office of the Commissioner of State Lands.

(c) Upon the filing of the field notes and plats, the Commissioner of State Lands shall pay for the cost of the survey of lands applied for out of the money deposited as provided in subsection (b) of this section.

(d) The applicant shall, after the filing of the field notes and survey, file affidavits of at least three (3) competent persons having full personal knowledge of the facts, stating that the lands applied for have actually emerged to high-water mark and are capable of cultivation, whereupon the Commissioner of State Lands may issue the deed upon the payment of a deed fee of five dollars (\$5.00).

22-5-406. Limited quitclaim of streambed of Mulberry River.

(a) The State of Arkansas quitclaims, to the owners of adjacent lands, title to the streambed of the Mulberry River, excluding oil, gas, and other mineral rights underlying the stream, to the center of the stream. However, the state retains an easement to run with the land for free passage by the public over the land by canoe, boat, other watercraft, swimming, wading, or walking, and for fishing, recreation, travel, commerce, and other purposes.

(b)(1) The State of Arkansas relinquishes and quitclaims to the owners of oil, gas, and other minerals underlying adjacent lands, and to their lessees, all right, title, and interest in and to the oil, gas, and other minerals underlying the bed of the Mulberry River.

(2) No affirmative action shall be required by the mineral owner or lessee, of the State of Arkansas to enable the mineral owner or lessee to retain ownership of or leasehold interest in the minerals under the bed of the Mulberry River.

(3)(A) If the mineral owner or lessee desires record proof of his continued ownership of the oil, gas, and other minerals, he may file an application with the Commissioner of State Lands for a quitclaim deed covering the oil, gas, and other minerals under the bed of the river.

(B) If the lands have been surveyed and platted, the mineral owner may furnish the Commissioner of State Lands a copy of the survey and plat.

(C) If the survey and plat sufficiently identify the land, no further survey shall be required.

(4)(A) In the alternative, the mineral owner may file with his application a deposit of the estimated cost of a survey, and the Commissioner shall direct the county surveyor of the county in which the lands are located, or some other competent surveyor, to make an accurate survey of the lands and to plat them in reference to the survey of adjacent lands and file the survey and plat in the Office of the Commissioner of State Lands.

(B) Upon the filing of the survey and plat, the Commissioner shall pay for the cost of the survey out of the money deposited as provided in subdivision (d)(1) of this section.

(C) If the deposit is insufficient for that purpose, the Commissioner may require an additional deposit.

(D) If any deposited funds remain after payment, they shall be refunded to the depositor.

(5) After the survey and plat are filed, the applicant shall file affidavits of at least two (2) competent persons having full personal knowledge of the facts, establishing that the applicant is the present owner or lessee of the minerals in and under the streambed.

(6) Upon receipt of the survey and affidavits, the Commissioner of State Lands may issue a quitclaim deed to the applicant upon the payment of a deed fee of one dollar (\$1.00). The quitclaim deed establishes that the state makes no claim to the oil, gas, and other minerals under the bed of the stream.

22-5-815. Mineral rights in lands covered by artificially created navigable waters.

(a) The State of Arkansas shall not acquire title to the oil, gas, and other minerals in and under lands covered by navigable waters artificially created by agencies of the United States or the State of Arkansas in any instance where the underlying minerals are not purchased or condemned and compensation paid therefor.

(b) The private ownership of the oil, gas, and other minerals in and under lands covered by artificially created navigable waters as established by this section shall be subservient to, and the exercise of rights of extraction and removal thereof shall not be permitted to interfere with or impair, the rights of public navigation, transportation, fishing, and recreation in and upon such navigable waters.

(c) No affirmative action shall be required by the mineral owner or the State of Arkansas to enable the mineral owner to retain ownership of the minerals in and under the artificially inundated lands.

(d)(1) If the mineral owner desires record proof of his continued ownership of the minerals, he may file an application with the Commissioner of State Lands for a quitclaim deed covering the minerals in and under the inundated lands.

(2) If the inundated lands have been surveyed and platted by an agency of the United States or the State of Arkansas, the mineral owner may furnish a copy of the survey and plat to the Commissioner of State Lands.

(3) If the survey and plat sufficiently identify the land, no further survey shall be required.

(e)(1) In the alternative, the mineral owner may file a deposit of the estimated cost of a survey with his application, and the Commissioner shall direct the county surveyor of the county in which the lands are located, or some other competent surveyor, to make an accurate survey of the lands and to plat them in reference to the survey of adjacent lands and file the survey and plat in the office of the Commissioner of State Lands.

(2) Upon the filing of the survey and plat, the Commissioner of State Lands shall pay for the cost of the survey out of the money deposited as provided in subdivision (e)(1) of this section.

(3) If the deposit is insufficient for that purpose, the Commissioner of State Lands may require an additional deposit.

(4) If any deposited funds remain after payment, they shall be refunded to the depositor.

(f) After the survey and plat of the agency of the United States or the State of Arkansas or the survey and plat of the surveyor selected by the Commissioner of State Lands are filed, the applicant shall file affidavits of at least two (2) competent persons having full personal knowledge of the facts, establishing that the applicant is the present owner of the minerals in and under the lands shown in the survey and that the lands have been inundated without payment of compensation for the minerals by an agency of the United States or the State of Arkansas.

(g) Upon receipt of the survey and affidavits, the Commissioner of State Lands may issue a quitclaim deed to the applicant upon the payment of a deed fee of one dollar (\$1.00). The quitclaim deed shall establish that the state has no claim in and makes no claim to the oil, gas, and other minerals in and under the lands described in the survey.

(h) The State of Arkansas quitclaims and relinquishes to the previous mineral owner and his successors and assigns all of the state's right, title, and interest to the oil, gas, and other minerals in and under lands covered prior to February 23, 1965, by artificially created navigable waters caused by an agency of the United States or the State of Arkansas and for which compensation has not been paid.

(i) If the previous mineral owner desires record proof of his continued ownership of the minerals, he may follow the procedure outlined in this section and obtain a quitclaim deed from the Commissioner of State Lands.

22-6-202. Property of state.

(a) All islands formed or which may form in the navigable waters of this state are declared to be the property of the state, except as provided in § 22-6-204, and subject to sale and disposition in the manner and form provided in this subchapter.

(b) The Commissioner of State Lands shall have full power and authority to lease or grant submerged lands and the Commissioner of State Lands shall promulgate rules and regulations as may be necessary to effectively carry out the provisions of this section, and, upon adoption, such rules and regulations shall have the full force and effect of law.